SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 263

C. D. WALKER, AS TRUSTEE IN BANKRUPTCY OF THE LAKE NURSERY COMPANY, BANKRUPT,

Petitioner,

v.

L. MAXCY, INC., A CORPORATION UNDER THE LAWS OF FLORIDA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The Opinion of the Circuit Court of Appeals for the Fifth Circuit will be found in 119 F. (2d) Pages 535-536. This Opinion reversed the decree of the District Court found in the Record at Pages 122-123.

II.

Jurisdiction.

1. Jurisdiction is invoked under Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat.

938, 28 U. S. C. A., Section 347, and under Section 24 (c) of the Bankruptcy Act as amended June 22, 1938, which said Act vests in the Supreme Court of the United States jurisdiction to review judgments, decrees and orders of the Circuit Courts of Appeals of the United States (July 1, 1898, 30 Stat. at L. 544, chap. 541, p. 24; May 27, 1926, 44 Stat. at L. 662, chap. 406, p. 9; June 22, 1938, 52 Stat. at L. 802, chap. 575, p. 1 (11 U. S. C. A. p. 47).)

Jurisdiction of the Circuit Court of Appeals is founded on U. S. Judicial Code Section 128, as amended by Act of February 13, 1925 (43 Stat. 936, 937) and by Act of May 27, 1926 (44 Stat. 664), and Section 24 (a) of the Bankruptcy Act as amended June 22, 1938 (11 U. S. C. A. 47).

2. The date of the judgment to be reviewed is May 2, 1941. Petition for rehearing was denied May 31, 1941.

3. The nature of the case, and the fact that the rulings were such as to bring this case within the jurisdictional provisions relied on, are fully disclosed in the petition for writ of certiorari, under Subdivisions A and B respectively. Hence in the interest of brevity are not here repeated.

4. The following are the cases believed to sustain the jurisdiction:

Buffum v. *Barceloux Co.*, 289 U. S. 227, 77 L. Ed. 1140, 53 S. Ct. 539;

Gross v. *Irving Trust Co.*, 289 U. S. 432, 53 S. Ct. 605, 77 L. Ed. 1243, 90 A. L. R. 1215;

Adair v. *Bank of America Nat. T. & Sav. Asso.*, 82 L. Ed. 889, 58 S. Ct. 594, 303 U. S. 350-362;

Wright v. *Vinton Branch of the Mountain Trust Bank of Roanoke, Virginia, et al.*, 300 U. S. 440-470, 81 L. Ed. 736;

Van Huffel v. *Harkelrode*, 284 U. S. 225, 227, 76 L. Ed. 256, 258, 52 S. Ct. 115, 78 A. L. R. 453, 18 Am. Bankr. Rep. (N. S.) 730;

Bronx Brass Foundry v. *Irving Trust Co.*, 297 U. S. 230, 232, 56 S. Ct. 451, 80 L. Ed. 657;

Duparquet Huot & Moneuse Co. v. *Evans*, 297 U. S. 216, 217, 56 S. Ct. 412, 80 L. Ed. 591;

Ivanhoe Building & Loan Ass'n. v. *Orr*, 295 U. S. 243, 247, 55 S. Ct. 685, 79 L. Ed. 1419;

Lerner v. *First Wisconsin National Bank of Milwaukee*, 294 U. S. 116, 119, 55 S. Ct. 360, 79 L. Ed. 796;

Schumacher v. *Beeler*, 293 U. S. 367, 371, 377, 55 S. Ct. 230, 79 L. Ed. 433;

Stephen Callaghan, et al. v. *Reconstruction Finance Corp.*, 297 U. S. 464-471, 80 L. Ed. 804, 56 S. Ct. 519.

III.

Statement of the Case.

The statement of the case is fully set forth in the petition for certiorari, and for the sake of brevity, will be omitted here.

IV.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In reversing the District Court in that the District Court had upheld its Local Rule 22 which provides that a petition for review must be called up before the Judge within twenty (20) days from the filing of the certificate of review, otherwise it should stand dismissed, and thus allowed a party litigant to ignore the Rules and later perfect an appeal.

2. The Circuit Court of Appeals erred in holding that a lienholder who had availed itself of the benefits of a sale free and clear of liens, and through said proceedings had procured title to the property involved belonging to the

bankrupt estate and covered by its lien, should not be required to pay the reasonable costs of the proceedings had for the sale of said property and the preservation costs thereof as fixed and determined by the Trial Court.

3. The Circuit Court of Appeals erred in failing and refusing to hold that the Referee and Trustee were entitled to receive their fees and commissions as prescribed by the Bankruptcy Act where the lienholder purchases property sold free and clear of liens in the Bankruptcy Court and pays as a part of the purchase price with his lien established in the bankruptcy proceedings where there are no funds in the general estate out of which said fees may be paid.

4. The Circuit Court of Appeals erred in failing and refusing to give proper effect to Section 48 of the Bankruptcy Act (11 U. S. C. A. 76) which provides that the trustee is entitled to a commission "on all monies disbursed or turned over to any person, including lienholders" in that it refused to allow and grant to the trustee his full commissions as prescribed by said Act.

5. The Circuit Court of Appeals erred in refusing and failing to give the proper interpretation to Section 2 (18) of the Chandler Act which provides that the Bankruptcy Court may tax and assess costs and expenses against the unsuccessful, as well as the successful party to a proceeding in bankruptcy.

6. The Circuit Court of Appeals erred in reversing the Referee and District Judge who had held that the sum of $5,500.00 was a reasonable amount to require the security holder to contribute to the costs of the proceedings where the property involved consisted of a citrus grove which had required constant care and expense for its preservation for a period of approximately three years at an expense of

over $12,000.00 to the bankrupt estate, and where the security holder realized in addition to the benefits accruing from the sale itself, a matured citrus crop which was grown on the property by the Trustee at the expense of the bankrupt estate and was not covered by the lien of the security holder.

7. The Circuit Court of Appeals erred in not ordering that the outstanding Trustee's certificates in the sum of $2,635.00 be paid out of the funds deposited by the lienholder where the lienholder procured, as a result of the proceedings, a matured citrus crop not covered by its lien but which was impressed with the lien of the certificates in question, the effect of which was to defeat and allow to go unpaid the obligations of the Bankruptcy Court.

8. The Circuit Court of Appeals erred in holding that the sum of $500.00 was a reasonable amount to assess the lienor for the costs of the proceedings to include all of the benefits which had been derived from the sale, upkeep, preservation costs, statutory fees and commissions of the officers of the court and other expenses involved.

9. The Circuit Court of Appeals erred in refusing to give effect to the holding of the Referee and the District Judge, based on the evidence submitted, that the sum of $5,500.00 was a reasonable sum comparable to and not in excess of the amount it would have cost the lienor to foreclose its mortgage in the State Court.

10. The Circuit Court of Appeals erred in holding that the lienor was entitled to the benefits of the sale had in the Bankruptcy Court free and clear of liens without requiring it to pay the costs of said proceedings as prescribed by the Bankruptcy Act and which would have been required in any other forum rendering similar services.

V.

ARGUMENT.

Summary of the Argument.

A. May a party litigant ignore a local rule of the District Court which provides that all petitions for review of a Referee's order in Bankruptcy shall be called up by the petitioner for hearing before the Judge within twenty (20) days from the filing of the certificate of review by the Referee, and which provides as a consequence for such failure that the petition for review should stand dismissed, and after failure to observe such rule later avail himself of his rights to an appeal?

The District Judge upheld the ruling and dismissed the petition for review. The Circuit Court of Appeals held to the contrary.

B. A lienholder who avails itself of the benefits of a sale free and clear of liens, and through said proceedings procures title to the property involved belonging to the bankrupt estate and covered by its lien, should be required to pay the reasonable costs of the proceedings had for the sale of said property as fixed and determined by the court.

C. The Trustee in Bankruptcy and the Referee who conduct the sale free and clear of liens of property belonging to the bankrupt estate are entitled to their prescribed commissions and fees under the Bankruptcy Act where the lienholder purchases the property with his lien as a part of the purchase price, and such fees should be charged to the lienholder where there are no funds in the general estate out of which such fees can be paid.

D. Under Section 48 of the Bankruptcy Act (11 U. S. C. A. p. 76) which provides that the Trustee is entitled to a commission "on all monies disbursed or turned over to any

person, including lienholders", a lienholder who utilizes the amount of his lien in purchasing property of the bankrupt estate sold free and clear of liens under order of the Bankruptcy court should be required to pay the Trustee's commissions as fixed by the Bankruptcy Act on the amount of the lien allowed by the Bankruptcy Court as part of the purchase price.

E. (a) Under Section 2 (18) of the Chandler Act, a Bankruptcy Court may tax and assess against a security holder who realizes on his security in the bankruptcy proceedings a portion of the costs and expenses incident to the preservation and liquidation of the security involved.

(b) The sum of $5,500.00 is a reasonable amount to require the security holder to pay where the property involved consists of a citrus grove which required constant care and expense for its preservation by the Bankruptcy Court for a period of approximately three years at an expense of over $12,000.00 to the bankrupt estate, and where the security holder realizes, in addition to the property involved, a matured citrus crop which was grown on the property by the Trustee at the expense of the bankrupt estate.

F. A Bankruptcy Court may tax and assess against the lienholder who avails himself of a sale free and clear of liens in bankruptcy proceedings, the costs and expenses of conducting the sale comparable to the costs of foreclosure in a State court, there being no funds in the general estate to pay the costs of such proceedings.

G. The Referee's findings of fact, confirmed by the District Judge, should not be reversed on appeal by the Circuit Court of Appeals when such findings are based upon the testimony of witnesses and are consistent with the evidence submitted.

A.

May a party litigant ignore a local rule of the District Court which provides that all petitions for review of a referee's order in bankruptcy shall be called up by the petitioner for hearing before the judge within twenty (20) days from the filing of the certificate of review by the referee, and which provides as a consequence for such failure that the petition for review should stand dismissed, and after failure to observe such rule later avail himself of his rights to an appeal?

Local Rule 22 of the Bankruptcy Rules prescribed for the guidance of procedure in the Southern District of Florida provides as follows:

> "Rule 22. Petition for Review.—All petitions for review of referee's orders in bankruptcy shall be filed with the referee within 10 days from the making of the order sought to be reviewed, and all such petitions shall, within 20 days from the filing of the certificate of review of the referee, be called up by the petitioner for hearing before the judge, otherwise such petition for review shall stand dismissed, unless for cause shown the time for hearing shall be extended".

The Referee's certificate of review was filed June 14, 1940 (R. 116-117). No effort at all was made to set the petition down for hearing, and the Trustee filed motion to dismiss the petition for review for failure to comply with the Rule under date of July 18, 1940 (R. 117-119). The District Judge granted the motion at a hearing had thereon on the 20th day of August, 1940 (R. 122-123).

The ruling of the District Court was in accord with the case of *Williamson* v. *Leith, et al.*, 36 F. (2d) 643 (C. C. A. 5th), when this same rule was before the Circuit Court of Appeals for the Fifth Circuit.

The ruling is also in accord with a decision of the Third Circuit, to-wit: *In re David*, 33 F. (2d) 748 (C. C. A. 3rd), in which case the Court held:

> "Should a person fail to observe the rule—which is what happened here—he will of course forfeit the advantage which, by observing it, the rule affords him. Of this advantage he cannot later avail himself by a writ of certiorari, appeal or other indirect process, for the method of reviewing an order of a referee, prescribed by General Order 27 and the supplemental rule of the district court is exclusive."

It is also in accord with *Roberts Auto & Radio Supply Co.* v. *Dattle*, 44 F. (2d) 159 (C. C. A. 3rd).

The ruling of the District Court is also in accord with a decision of the Ninth Circuit, to-wit: *Patents Process, Inc., et al.* v. *Durst, et al.*, 69 F. (2d) 283 (C. C. A. 9th).

The District Courts generally uphold similar local rules:

In re Publix Enterprises, Inc., 7 Fed. Supp. 722 (S. D. N. Y.);

In re Parent, 30 Fed. Supp. 943 (D. C. New Hampshire);

In re Barta, 8 Fed. Supp. 84 (N. D. California).

The particular rule in question has not been passed on by the Supreme Court of the United States so far as we have been able to ascertain. However, the Circuit Courts of Appeal and the District Courts generally recognize the efficacy of similar supplemental rules to General Order 27, and the cited cases uphold the contention that the rule is exclusive and must be followed, otherwise the right to appeal is waived. Other cases hold that the application for extension of time must be made before the time specified has expired, otherwise the application made after the time has expired, if granted, would be the arbitrary setting of a new date.

Applying the principles enunciated in the foregoing cases, the Referee's order taxing $5,500.00 as the costs against L. Maxcy, Inc. had become final, and to extend the time further in violation of Rule 22 of the District Court amounts to an arbitrary fixing of a new date, rather than the extending of the time since L. Maxcy, Inc. had waited for fourteen (14) days beyond the time specified in the Rule.

Certainly there is no reason why L. Maxcy, Inc. should have been allowed additional time to appeal as was held by the Circuit Court of Appeals. We submit that the District Judge was correct in his decision interpreting the local rule, and that the Circuit Court of Appeals clearly erred in failing to affirm the action of the District Court which had affirmed the Referee.

It will be observed that L. Maxcy, Inc. took no appeal from the previous order of the District Judge entered on the 22nd day of April, 1940 (R. 107-111), which order directed the Referee to fix and determine the costs in accordance with the Opinion of the court and the order so entered. It is our position that this order of April 22nd, 1940 had become final under authority of *Patents Process, Inc., et al.,* v. *Durst, et al.,* 69 F. (2d), 283 (C. C. A. 9th).

In view of the apparent conflict in the holdings of the Circuit Court of Appeals for the Fifth Circuit, and in view of the fact that the holding in the instant case is in conflict with the holdings in other circuits, this situation should unquestionably be clarified.

B.

Where a lienholder avails itself of the benefits of a sale free and clear of liens, and through said proceedings procures title to the property involved belonging to the bankrupt estate and covered by its lien, should the lienholder be required to pay the reasonable costs of the proceedings had for the sale of said property as fixed and determined by the court?

It will be noted that the lienor, by motion filed (R. 102), asked that the sale to it be confirmed and that the trustee be directed to execute a deed to it. This motion recited that the sale had been made subject to the payment of costs, allowances and expenses that might be lawfully assessed against the lienor. Pursuant to this motion, order was entered directing the Trustee to deliver deed to L. Maxcy, Inc., and the sale was confirmed on motion to the lienor and the sum of $8,953.00 was deposited in the registry of the court to abide the final fixing of costs and expenses. It will be further noted that the lienor recited the existence of a ripe citrus crop which it procured by virtue of the confirmation, and which citrus crop was not covered by the lien of L. Maxcy, Inc., but had been produced at the expense of the bankrupt estate.

Under Florida law a mortgage holder has no title but must foreclose its security to obtain title. The position of the trustee is that the opinion of the Circuit Court of Appeals rendered herein is in conflict with the holding in the case of *Virginia Securities Corporation* v. *Patrick Orchards, Inc.*, 20 F. (2d) 78 (C. C. A. 4th), which was a case involving the sale free and clear of liens and the preservation costs incurred in an apple orchard where the Fourth Circuit Court of Appeals held:

> "Where lien creditor avails himself of instrumentalities of bankruptcy court in enforcement of his lien,

proceeds of property on which lien exists may be charged with expenses necessary in enforcement of lien, as well as in preservation of property."

Citing in support of this ruling, the following cases:

In re Barber (D. C.), 97 Fed. 547;

In re Torchia (D. C.), 185 Fed. 576; *Id.* (C. C. A.), 188 Fed. 207;

In re Chambersburg (D. C.), 190 Fed. 411;

In re West (D. C)., 232 Fed. 903;

In re Rauch (D. C.), 226 Fed. 982; *The Bethulia* (D. C.), 200 Fed. 879; *Gugel* v. *Bank* (C. C. A.), 239 Fed. 676.

It is therefore submitted that the Circuit Court of Appeals for the Fifth Circuit is out of line with the Fourth Circuit and with other circuits as well on this question.

C.

Are the trustee in bankruptcy and the referee who conduct the sale free and clear of liens of property belonging to the bankrupt estate entitled to their prescribed commissions and fees under the Bankruptcy Act where the lienholder purchases the property with his lien as a part of the purchase price, and if so, may such fees be charged to the lienholder where there are no funds in the general estate out of which such fees may be paid?

The foregoing question was answered by the Circuit Court of Appeals in the negative for the reason that the amount which was arbitrarily fixed by the Circuit Court of Appeals is insufficient to pay the statutory fees of the trustee and the referee as prescribed by the Chandler Act, without taking into consideration other costs and expenses incident to the sale, such as advertising, costs of abstract, and the costs of the proceedings, such as taking the testi-

mony on the issues involved between the lienors as to the respective validity and priority of their liens.

Simple calculation will reveal that if the trustee were entitled to the prescribed commissions on the sale, the amount due him for normal administration would be in excess of $500.00, and the referee would also be entitled to 1% of the purchase price of $52,500.00. The claim had been allowed in bankruptcy and was a debt secured by a lien. Therefore, the referee was entitled to his commission of 1%. The debtor realized this amount on the claim in bankruptcy and accordingly the referee's fees were taxable against the funds. This at least should be the holding under authority of *In re Huggins Co.*, 179 Fed. 490, 29 L. R. A. (N. S.) 737, 24 A. B. R. 715 (C. C. A. Mo.). The same effect, see *Varney* v. *Harlow*, 210 Fed. 824, 31 A. B. R. 339 (C. C. A. Va.).

In this connection, it is stated in Volume 6, Remington on Bankruptcy, 4th Edition, page 284:

> "The commissions of referees have never been computed upon any other sums than 'those disbursed to creditors.' And, lienholders may or may not be creditors. If they happen to be creditors and money is disbursed to them, then the referee is entitled to commissions upon such money, the fact of being lienholders not detracting from the attribute of being also creditors. Trustees and receivers, however, by the Amendment of 1910 were given commissions not only on amounts disbursed to creditors, whether lienholders or not, but upon amounts disbursed to any other person, including lienholders who were not creditors. This was the meaning of the framers of this amendment and this is the clear meaning of the section itself."

We do not find that the Supreme Court of the United States has passed on this question but there is apparent need for clarification because of the inconsistent holding in the instant case as compared with the cited cases, and under

the terms of the act it is submitted that the ruling of the Fifth Circuit Court of Appeals is in error.

D.

Under Section 48 of the Bankruptcy Act (11 U. S. C. A. p. 76) which provides that the trustee is entitled to a commission "on all monies disbursed or turned over to any person, including lienholders" **may a lienholder who utilizes the amount of his lien in purchasing property of the bankrupt estate sold free and clear of liens under order of the Bankruptcy Court be required to pay the trustee's commissions as fixed by the Bankruptcy Act on the amount of the lien allowed by the Bankruptcy Court as part of the purchase price?**

The Circuit Court of Appeals in the instant case makes no provision whatever for the referee's and trustee's commissions as prescribed by the Chandler Act. Certainly the sum of $500.00 is inadequate to take care of the trustee and the referee. Under Section 40 of the Chandler Act, the trustee was entitled to his commission for normal administration. This would have amounted to more than $500.00, and the referee an approximate similar sum, so the fees fixed by the Circuit Court of Appeals were insufficient to provide any funds whatsoever for the trustee.

In Volume 6, Remington on Bankruptcy, Fourth Edition, p. 2743, the statement is made:

> "2743. Referee's Commissions Where Creditor Purchases and Applies Dividend on Price.—Also, where a creditor buys in the property and applies his dividends in part payment therefor, the referee is entitled to commissions on the dividends so applied."

Citing in support thereof the case of:

> Morse Iron Works & Dry Dock Co., 154 F. 214, 18 A. B. R. 846 (D. C. N. Y.).

This particular question does not seem to have been passed on by the Circuit Court of Appeals other than in the instant case. We submit that the Circuit Court of Appeals for the Fifth Circuit in this respect is clearly in error.

E.

Under Section 2 (18) of the Chandler Act, may a Bankruptcy Court tax and assess against a security holder who realizes on his security in the bankruptcy proceedings a portion of the costs and expenses incident to the preservation and liquidation of the security involved?

Section 2 (18) of the Chandler Act is as follows:

> "(18) Tax costs and render judgments therefor against the unsuccessful party, against the successful party for cause, in part against each of the parties, and against estates, in proceedings under this Act;"

The foregoing cited portion of the Chandler Act is slightly different from the similar provision in the old Act in that the words in the old Act were limited to costs "in proceedings in bankruptcy", whereas under the new Act the words were used "in proceedings under this Act".

The particular question does not appear to have been passed on by the Supreme Court, but even in the absence of the specific authority granted by the terms of the original Act or of the Chandler Act, it is our position that the Bankruptcy Court, under its broad general equity powers could tax and assess costs of the proceedings which inured to the benefit of the lienor, and for the liquidation and preservation expenses incident to enabling the lienor to realize upon his debt and security. Certainly this is the holding of *Virginia Securities Corporation* v. *Patrick Orchards, Inc.*, 20 F. (2d) 78 (C. C. A. 4th Cir.), which case is cited by the Supreme Court with approval in the case of *Adair* v. *Bank of America Nat. T. & Sav. Asso.*, 82 L. Ed. 889, 58

S. Ct. 594, 303 U. S. 350-362. It is not contended that any charges should or could be made against the lienor for general administration. However, as was pointed out in the *Patrick* case, the fees and allowances should be made on the basis of services rendered in the administration of the lien property, and in the cited case, the Court said:

> "* * * the lienholder should be charged with the reasonable costs of such proceedings in the bankruptcy court as are appropriate to foreclosing the lien and selling the incumbered property."

As was pointed out by Mr. Justice Reed in the *Adair* case, *supra:*

> "* * * and the cost of protecting a fund in court is everywhere recognized as a dominant charge on that fund."

It is submitted that the contrarity of opinion existing as between the Fourth Circuit Court of Appeals' decision in the *Patrick* case and in the instant case is sufficient basis alone to grant the certiorari, and it is further submitted that the holding of the Fourth Circuit is the better view.

F.

Is the sum of $5,500.00 a reasonable amount to require the security holder to pay where the property involved consists of a citrus grove which required constant care and expense for its preservation by the Bankruptcy Court for a period of approximately three years at an expense of over $12,000.00 to the bankrupt estate, and where the security holder realizes, in addition to the property involved, a matured citrus crop which was grown on the property by the trustee at the expense of the bankrupt estate?

The Referee and the District Judge answered the foregoing question in the affirmative and based on the testi-

mony found that the sum of $5,500.00 was a reasonable amount to require the security holder to pay under the circumstances involved.

The Circuit Court of Appeals clearly overlooked the fact that the trustee's certificates, while subject to the lien of the lienor which existed at the time of the bankruptcy proceedings, nevertheless constituted a first lien on the citrus crop which was ripe and mature and which the lienor procured through getting the sale confirmed. In the petition for rehearing it was pointed out to the Circuit Court of Appeals, in the fourth ground thereof, that L. Maxcy, Inc., had no lien on this mature citrus crop and that these certificates should have been paid out of the proceeds of the crop. This procedure very evidently left the Court obligations outstanding and unpaid and enabled L. Maxcy, Inc. to procure the crop freed of the lien of the certificates. Moreover, as an equitable proposition a portion of the funds had been used for preservation expenses, and L. Maxcy, Inc., had never objected to the issuance of the certificates, although appearing in the proceedings throughout. It was unquestionably aware of the existence of the certificates at the time it had asked for confirmation and at the time it had made the deposit in the Registry of the Court to cover the costs of the proceedings.

The record will disclose that no testimony was offered by L. Maxcy, Inc., as against the petition of the Trustee setting up the services rendered.

It is pointed out by the District Judge in his Opinion (R. 108-111) that L. Maxcy, Inc., had no lien upon the citrus crop after the expiration of its contract. This holding was not disturbed by the Circuit Court of Appeals and is in accord with the Florida Law.

E. C. Fitz & Company v. *Eldridge*, 176 So. 539;

Summerlin v. *Orange Shores, Inc.*, 97 Fla. 996, 122 So. 508.

The Trustee's report shows that he had paid out some $764.00 for expenses in caring for the property which he was certainly entitled to have reimbursed. His report further shows that he had expended over $12,000.00 in cultivating, fertilizing and caring for the property for the three-year period. His petition clearly sets forth the services rendered in connection with the services of the officers of the court, including the referee, trustee and other expenses. Even under normal administration, the trustee and referee would have been entitled to the prescribed statutory fees for their services and under the facts set forth and under the authorities cited herein they were clearly entitled to be compensated for the benefits which accrued to the lienor.

In Volume 4, Remington on Bankruptcy, p. 2613, the rule is stated as follows:

> "Certainly Congress had the right to change the forum in which lienholders might realize upon their securities, even to the extent of excluding all other courts, if the bankruptcy court has possession, and no sound reason exists for making out of the bankruptcy court a charity court, in which lienholders can realize on their securities without the costs and expenses they would ordinarily be charged with in the State Courts, nor for making bankruptcy trustees work at their own risk of any pay whatsoever in marshaling liens on property in their possession and selling the property covered thereby."

This statement of Mr. Remington is borne out by the numerous holdings of the Supreme Court of the United States, including the case of *Adair* v. *Bank of America Nat. T. & Sav. Asso.*, 82 L. Ed. 889, 58 S. Ct. 594, 303 U. S. 350-362; *Wright* v. *Vinton Branch of the Mountain Trust Bank of Roanoke, Virginia, et al.*, 300 U. S. 440, 470, 81 L. Ed. 745, 57 S. Ct. 556, and numerous holdings of the Supreme Court emphasizing the fact that the bankruptcy court has para-

mount exclusive jurisdiction over the property of the bankrupt.

It is submitted that the Referee and District Judge endeavored to fix a reasonable amount to require the lienor to pay for the benefits received, and that the Circuit Court of Appeals clearly erred in arbitrarily fixing the sum of $500.00 against the findings and allowance made by the District Judge. The Trial Court findings should not have been disturbed since the findings are consistent with the evidence and the facts and circumstances

We submit that the Circuit Court of Appeals was not warranted in disregarding these findings:

Harkin v. *Brundage,* 276 U. S. 36, 53; 48 S. Ct. 268, 72 L. Ed. 457.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the proper construction of the National Bankruptcy Act may be had, settled and determined; that conflicts mentioned herein may be settled amicably and that the practice and jurisdiction of the Circuit Courts of Appeals may be more clearly defined, and that to such ends, a writ of certiorari should be granted, and this Court should review the decision of the Circuit Court of Appeals and finally reverse it.

Dated at Orlando, Florida, this 10th day of July, A. D. 1941.

Respectfully submitted,

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